NO. 49239-3-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JEREMY OVERTON,

Appellant.

BRIEF OF APPELLANT

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Assignment of Error

1. The trial court violated the defendant's right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when it accepted the jury's verdict finding the defendant guilty of attempted second degree rape because substantial evidence does not support the conclusion that the defendant intended to have unconsented sexual intercourse with the complaining witness.

2. If the state substantially prevails on appeal this court should exercise its discretion and refuse to impose appellant costs because there is not evidence that the defendant has either the present or future ability to pay legal-financial obligations.

Issues Pertaining to Assignment of Error

1. In a case in which substantial evidence supports the conclusion that a defendant committed the crime of indecent liberties but did not have an intent to have unconsented sexual intercourse with the complaining witness, does a trial court violate a defendant's right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, if it enters judgment against that defendant for attempted second degree rape?

2. In a case in which the appellant does not have either the present or future ability to pay legal financial obligations, should an appellate court exercise its discretion and refuse to impose appellant costs if the state substantially prevails on appeal?

STATEMENT OF THE CASE

Factual History

On the evening of January 26, 2014, Kelsey Schmidt, her live-in boyfriend Toby Clark, Toby's best friend Adam Thayer, and Kelsey's best friend Monica Trabue met at Kelsey and Toby's house in Olympia, had a few drinks, and then went out for a night of drinking on the town to celebrate Kelsey's promotion at work. RP 115-116, 129, 163-164, 284-287, 353-359.[1] She was then employed by the Washington State Department of Corrections. RP 163-164. After drinking at Kelsey[2] and Toby's house, the group took a taxi to a tavern called the "Big Whisky Bar. RP 165. Once there the group met with the defendant Jeremy Overton, one of Kelsey's co-workers she had invited to the celebration. RP 165-166.

After drinking at the "Big Whisky Bar" the party went to a second bar in Olympia called the "Jakes" where they all had more to drink. RP 115-120, 167-168, 285-287, 353-359. The party then moved to a third bar called the "Brotherhood" where they drank more alcohol. *Id.* Eventually, the group returned to Kelsey and Toby's house with the defendant driving. *Id.*

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[1]The record on appeal includes four continuously numbered volumes of verbatim reports of the CrR 3.5 hearing and jury trial held in June 15, 16, 20 and 21, 2016. It is referred to herein as "RP [page #]."

[2]The remainder of the Brief of Appellant principally uses first names for clarity and brevity; no disrespect is intended.

However, once back at home the group discovered that they did not have any more alcohol. RP 119-120, 288-291. At Monica's suggestion, she and Kelsey had the defendant drive them to Monica's house where she was able to get a half-gallon of vodka. RP 120-121. Once back at Kelsey and Toby's house, the group starting playing a drinking game called "King's Cup" during which different people or groups of people would drink alcohol based upon which cards were drawn. RP 169-170, 198, 291, 304, 359.

During the drinking game the defendant offered to and did give both Kelsey and Monica's back rubs and offered to given them foot messages. RP 120-121, 171-172, 295-296. Both Kelsey and Monica later stated that this made them uncomfortable and eventually Monica returned home, even though she had planned to stay the night at Kelsey and Toby's house. RP 171-172, 295-296. A little while later Kelsey decided to go upstairs and go to bed, as she was very tired and had to get up early to participate in and 5K run. RP 173-174. As a result, she went upstairs, changed into her running clothes, got in bed and went to sleep. *Id.* According to Kelsey and the other person's at her house she was intoxicated when she went to bed although not so intoxicated that she was sick or "falling down drunk." RP 170, 142, 293-294, 362.

When Kelsey went to bed her boyfriend Toby, his friend Adam and the defendant were practicing disarming techniques against persons with

knives and handguns. RP 120-121, 160, 185. Eventually Toby went into the bathroom and the defendant went upstairs to tell Kelsey good by as he was going to go home. RP 122, 362. From his vantage point in the living room Adam watched the defendant walk up the stairs, knock on the bedroom door, and enter. RP 388-397-399. After a couple minutes Adam became suspicious of what was going on and went upstairs and looked in the bedroom door. RP 362, 391-393. Toby was still in the bathroom at the time. RP 122.

According to Adam's later testimony, when he entered Kelsey and Toby's bedroom, he saw Kelsey laying on her back on the bed with her running pants and panties pulled down to her knees and her light jacket, t-shirt and sports bra pulled up to her neck exposing her breasts. RP 364-365. The defendant was laying across her with his mouth on her lower abdomen. *Id.* Upon seeing this Toby yelled at the defendant and ordered him out of the house. RP 365-366. About this time Kelsey partially woke up to find her pants and panties around her knees, her jacket, shirt and bra pulled up, the defendant with his mouth on her abdomen, and Adam standing in the doorway yelling. RP 183-188. She then observed Adam force the defendant down the stairs all the time with the defendant protesting that he did not know what was happening. *Id.* At this point Toby came out of the bathroom and helped force the defendant out of the house into his car. RP 124-126.

367-368. Adam and Toby then returned to the house and Adam called the police. RP 367-368. Kelsey, who had gone downstairs briefly, went back up to her bedroom and went back to sleep in her bed. RP 188-191.

Within 5 minutes a police officer arrived and took recorded statements from everyone. RP 121, 147, 299. He then took Kelsey to the hospital for a rape examination. RP 190-191, 214, 239. A little later the officer went to the defendant's house and took a recorded statement from him, during which the defendant admitted going up to Kelsey's bedroom to tell her goodby but denied touching her. RP 242-243, 246-247. Another officer later collected Kelsey's rape kit from the hospital along with DNA samples he took from the defendant and transported them both to the state crime lab. RP 96-108. In fact, he later stated that he had both packages together on the front seat of his patrol vehicle when he drove to the lab. RP 109-110.

Procedural History

By information filed March 14, 2014, and amended two years later on May 13, 2016, the Thurston County Prosecutor charged the defendant Jeremy Overton with one count of attempted second degree rape under RCW 9A.44.050(1)(b) and one alternative count of indecent liberties under RCW 9A.44.100(1)(b). CP 4, 68. The case eventually came on for trial before a jury with the state calling 10 witnesses, including Kelsey, her boyfriend Toby,

Toby best friend Adam and Kelsey's best friend Monica. RP 113, 162, 283, 352. They testified to the facts contained in the preceding factual history. *See* Factual History, *supra*.

The state also called an employee from the Thurston County Communications Center, the investigating officers, and the forensic scientist who did the analysis on the DNA samples taken during the investigation of the case. RP 410-434. Over defense objection of hearsay the court admitted Adam Thayer's 911 call into evidence as an excited utterance. RP 78-84. Again over defense objection the court allowed the forensic scientist to testify that Kelsey Schmidt's lower abdomen swabs had the defendant's DNA on them. RP 273-274, 453. As to this evidence the defense had objected that the officer who had obtained the DNA samples taken from Kelsey's abdomen had contaminated those samples by transporting them with the DNA samples taken from the defendant. *Id.* The court overruled this objection and found that the argument went to the weight of the evidence, not its admissibility. RP 453.

After the state rested its case the defense called one witness: Dr. Donald Riley. RP 435-484. Dr. Riley is an associate professor at the University of Washington Medical Center, a research scientist for the VA Medical Center and he has a PHD in Biological Chemistry. RP 437-439. During his professional career he has authored publication on DNA analysis.

Id. He has also testified in 140 to 150 cases as an expert on DNA analysis. *Id.* During his testimony Dr. Riley stated the following concerning his review of the DNA analysis from this case. RP 445-447. He first noted that it was contrary to proper DNA analysis protocols for the police officer to transport the DNA samples taken from the defendant along with the DNA samples taken from Kelsey Schmidt, given the possibility of contamination. RP 445-447, 467-470, 473. In addition, he noted that the amount of the Defendant's DNA found on the lower abdomen swabs taken from Kelsey were minute, weighing only a few nanograms. RP 478. With amounts this small there is always a possibility of contamination given the humans shed skin cells at a rate of millions per hour. RP 478-479. Thus, while Dr. Riley admitted that the defendant's DNA was present on the lower abdomen swabs at the time they were tested in the lab, he was unable to conclusively state when that minute amount of DNA got on the swabs, given the small amount and the possibility of contamination. RP 469-470.

After Dr. Riley testified, the state recalled two witnesses for short rebuttal. RP 485-494. The defense then called Dr. Riley for brief sur-rebuttal. RP 494-499. At this point the court instructed the jury with neither party making any objection to the instructions or taking exception to the refusal to give any specific requests for instructions. RP 507. Following closing argument by counsel the jury retired for deliberation, eventually

returning a verdict of guilty on the charge of attempted second degree rape. RP 509-524, 524-578, 585-588; CP 121-133, 119-120. Pursuant to their instructions, the jury did not return a verdict on the alternative charge of indecent liberties. CP 120. The court later sentenced the defendant within the standard range to a term of 60 months to life in prison. CP 175-188. It did not impose any discretionary legal obligations. *Id.* The defendant thereafter filed timely notice of appeal and the court signed an order of indigency and appointed an attorney to represent the defendant on appeal. CP 175-188.

ARGUMENT

I. SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THE DEFENDANT'S CONVICTION FOR ATTEMPTED SECOND DEGREE RAPE BECAUSE THE FACTS DO NOT SUPPORT THE CONCLUSION THAT THE DEFENDANT HAD THE INTENT TO HAVE UNCONSENTED SEXUAL INTERCOURSE WITH THE COMPLAINING WITNESS.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: "[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law." *In re Winship*, 397 U.S. at 364. If substantial evidence does not support a finding that each and every element of the crime charged is proved beyond a reasonable doubt, then any remedy other than dismissal with prejudice violates a defendant's right under Washington Constitution, Article 1, § 9 and United States Constitution, Sixth Amendment to be free from double jeopardy. *State v. Anderson*, 96 Wn.2d 739, 742, 638 P.2d 1205 (1982); *Hudson v. Louisiana*, 450 U.S. 40, 101 S.Ct. 970, 67 L.Ed.2d 30 (1981).

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* "Substantial evidence" in the context of a criminal case, means evidence sufficient to persuade "an unprejudiced thinking mind of the truth of the fact to which the evidence is directed." *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). The test for determining the sufficiency of the evidence is whether, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980).

In the case at bar, the state charged the defendant with attempted second degree rape under RCW 9A.44.050(1)(b) pursuant to an information alleging that he took "a substantial step with intent to engage in sexual intercourse of K.L.S., when the victim was incapable of consent by reason of being physically helpless or mentally incapacitated." CP 68. In the alternative the state charged the defendant with indecent liberties under RCW

9A.44.100(1)(b). Given their instructions and guilty verdict on the attempted rape charge, the jury did not address the alternative indecent liberties claim. As the following explains, while substantial evidence does support the alternative charge of indecent liberties, it does not support the conclusion that the defendant acted with the intent to engage in unconsented intercourse with the complaining witness as is required to sustain a conviction for attempted second degree rape.

In this case the state charged the defendant with attempted second degree rape under RCW 9A.28.020(1) and RCW 9A.44.050(1)(b). The first section of the former statute defines criminal attempts and states:

> (1) A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime.

RCW 9A.28.020(1).

The latter statute defines one alternative method of committing the crime of second degree rape and states as follows:

> (1) A person is guilty of rape in the second degree when, under circumstances not constituting rape in the first degree, the person engages in sexual intercourse with another person:
>
> . . .
>
> (b) When the victim is incapable of consent by reason of being physically helpless or mentally incapacitated;

RCW 9A.44.050(1)(b).

Thus, under these two statutes, the state in this case had the burden of proving beyond a reasonable doubt that the defendant acted with the intent to have "sexual intercourse" with the complaining witness while she was "incapable of consent by reason of being physically helpless or mentally incapacitated."

By contrast, under RCW 9A.44.100(1)(b), the state did not have the burden of proving an intent to have sexual intercourse in order to obtain a conviction for indecent liberties as it did under the rape allegation. The indecent liberties statute states as follows under the charged alternative:

> (1) A person is guilty of indecent liberties when he or she knowingly causes another person to have sexual contact with him or her or another:
>
> . . .
>
> (b) When the other person is incapable of consent by reason of being mentally defective, mentally incapacitated, or physically helpless;

RCW 9A.44.100(1)(b).

Under this statute the state had no burden of proving an intent to have sexual intercourse. Rather, the state only needed to prove that the defendant had "sexual contact" with a person incapable of consent. Under RCW 9A.44.010 (2), "sexual contact" is defined as "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party."

In the case at bar there was substantial evidence that the defendant had "sexual contact" with the complaining witness while she was either asleep or passed out or both. According to the complaining witness and Adam Thayer, at the time Adam entered Kelsey's bedroom. the defendant was kissing Kelsey's lower abdomen having pulled her pants down and her shirt up, thereby exposing her vagina and breasts. This constituted substantial evidence of "sexual contact."

By contrast, this evidence, in light of all the facts, does not support a conclusion that the defendant acted with the intent to have sexual intercourse. These facts were as follows. First, Kelsey's bedroom was in close physical proximity to both Kelsey's boyfriend Toby and Toby's best friend Adam. Second, according to Toby's testimony, the defendant was aware that Adam had watched him enter the bedroom ostensibly to tell Kelsey that he was leaving. Third, when Adam entered the bedroom he did not claim that the defendant had taken off any of his own clothes or disrobed in any fashion preliminary to intercourse. Fourth, while substantial evidence supported the conclusion that the defendant had partially disrobed Kelsey, there was no claim that he had even touched her on her vagina or breasts.

These facts, when seen as a whole support a conclusion that the defendant did have sexual contact with Kelsey while she was incapable of consent. However, they do not constitute substantial evidence that he

intended to have sexual intercourse with her while she was incapable of consent. As a result, in the case at bar the trial court erred when it accepted the jury's verdict of guilty to the crime of attempted second degree rape. As a result, this court should vacate the defendant's conviction and remand for trial upon the charged alternative offense the jury did not consider.

II. IF THE STATE SUBSTANTIALLY PREVAILS ON APPEAL THIS COURT SHOULD EXERCISE ITS DISCRETION AND REFUSE TO IMPOSE APPELLANT COSTS.

The appellate courts of this state have discretion to refrain from awarding appellate costs even if the State substantially prevails on appeal. RCW 10.73.160(1); *State v. Nolan*, 141 Wn.2d 620, 626, 8 P.3d 300 (2000); *State v. Sinclair*, 192 Wn. App. 380, 382, 367 P.3d 612, 613 (2016). A defendant's inability to pay appellate costs is an important consideration to take into account when deciding whether or not to impose costs on appeal. *State v. Sinclair, supra.* In the case at bar the trial court found Jeremy Overton indigent and entitled to the appointment of counsel at both the trial and appellate level. CP 3, 165-166. In the same matter this Court should exercise its discretion and disallow trial and appellate costs should the State substantially prevail.

Under RAP 14.2 the State may request that the court order the defendant to pay appellate costs if the state substantially prevails. This rule states that a "commissioner or clerk of the appellate court will award costs to

the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review." RAP 14.2. In *State v. Nolan*, *supra*, the Washington Supreme Court held that while this rule does not grant court clerks or commissioners the discretion to decline the imposition of appellate costs, it does grant this discretion to the appellate court itself. The Supreme Court noted:

> Once it is determined the State is the substantially prevailing party, RAP 14.2 affords the appellate court latitude in determining if costs should be allowed; use of the word "will" in the first sentence appears to remove any discretion from the operation of RAP 14.2 with respect to the commissioner or clerk, but that rule allows for the appellate court to direct otherwise in its decision.

State v. Nolan, 141 Wn. 2d at 626.

Likewise, in RCW 10.73.160 the Washington Legislature has also granted the appellate courts discretion to refrain from granting an award of appellate costs. Subsection one of this statute states: "[t]he court of appeals, supreme court, and superior courts ***may*** require an adult offender convicted of an offense to pay appellate costs." (emphasis added). In *State v. Sinclair*, *supra*, this Court recently affirmed that the statute provides the appellate court the authority to deny appellate costs in appropriate cases. *State v. Sinclair*, 192 Wn. App. at 388. A defendant should not be forced to seek a remission hearing in the trial court, as the availability of such a hearing "cannot displace the court's obligation to exercise discretion when properly

requested to do so." *Supra.*

Moreover, the issue of costs should be decided at the appellate court level rather than remanding to the trial court to make an individualized finding regarding the defendant's ability to pay, as remand to the trial court not only "delegate[s] the issue of appellate costs away from the court that is assigned to exercise discretion, it would also potentially be expensive and time-consuming for courts and parties." *State v. Sinclair*, 192 Wn. App. at 388. Thus, "it is appropriate for [an appellate court] to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellate brief." *State v. Sinclair*, 192 Wn. App. at 390. In addition, under RAP 14.2, the Court may exercise its discretion in a decision terminating review. *Id.*

An appellate court should deny an award of costs to the state in a criminal case if the defendant is indigent and lacks the ability to pay. *Sinclair, supra.* The imposition of costs against indigent defendants raises problems that are well documented, such as increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration. *State v. Sinclair*, 192 Wn.App. at 391 (citing *State v. Blazina, supra*). As the court notes in *Sinclair*, "[i]t is entirely appropriate for an appellate court to be mindful of these concerns." *State v. Sinclair*, 192 Wn.App. at 391.

In *Sinclair*, the trial court entered an order authorizing the defendant to appeal *in forma pauperis*, to have appointment of counsel, and to have the preparation of the necessary record, all at State expense upon its findings that the defendant was "unable by reason of poverty to pay for any of the expenses of appellate review" and that the defendant "cannot contribute anything toward the costs of appellate review." *State v. Sinclair*, 192 Wn. App. at 392. Given the defendant's indigency, combined with his advanced age and lengthy prison sentence, there was no realistic possibility he would be able to pay appellate costs. Accordingly, the Court ordered that appellate costs not be awarded.

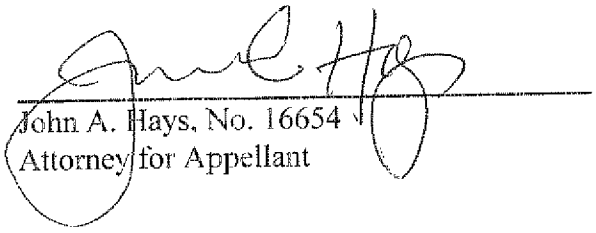
Similarly in the case at bar, the defendant is indigent and lacks an ability to pay. In fact, the defendant is a 33-year-old convicted sex offender who will have little capacity to find gainful employment and support himself or his family, let alone pay legal financial obligations. Given the trial court's finding of indigency at the trial level and at the appellate level, it is unrealistic to think that the defendant will be able to pay appellate costs. Thus, this court should exercise its discretion and order no costs on appeal should the state substantially prevail.

CONCLUSION

Substantial evidence does not support the conclusion that the defendant had the intent to have unconsented sexual intercourse with the complaining witness. As a result, this court should vacate the defendant's conviction for attempted second degree rape and remand for a new trial on the alternative charge of indecent liberties. In the alternative, this court should exercise its discretion and refrain from imposing costs on appeal.

DATED this 17th day of January, 2017.

Respectfully submitted,



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APPENDIX

WASHINGTON CONSTITUTION
ARTICLE 1, § 3

No person shall be deprived of life, liberty, or property, without due process of law.

UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

. . .

RCW 9A.44.050
Rape in the Second Degree

(1) A person is guilty of rape in the second degree when, under circumstances not constituting rape in the first degree, the person engages in sexual intercourse with another person:

(a) By forcible compulsion;

(b) When the victim is incapable of consent by reason of being physically helpless or mentally incapacitated;

(c) When the victim is a person with a developmental disability and the perpetrator is a person who is not married to the victim and who: (i) Has supervisory authority over the victim; or (ii) Was providing transportation, within the course of his or her employment, to the victim at the time of the offense;

(d) When the perpetrator is a health care provider, the victim is a client or patient, and the sexual intercourse occurs during a treatment session, consultation, interview, or examination. It is an affirmative defense that the defendant must prove by a preponderance of the evidence that the client or patient consented to the sexual intercourse with the knowledge that the sexual intercourse was not for the purpose of treatment;

(e) When the victim is a resident of a facility for persons with a mental disorder or chemical dependency and the perpetrator is a person who is not married to the victim and has supervisory authority over the victim; or

(f) When the victim is a frail elder or vulnerable adult and the perpetrator is a person who is not married to the victim and who: (i) Has a significant relationship with the victim; or (ii) Was providing transportation, within the course of his or her employment, to the victim at the time of the offense.

(2) Rape in the second degree is a class A felony.

RCW 9A.44.100
Indecent Liberties

(1) A person is guilty of indecent liberties when he or she knowingly causes another person to have sexual contact with him or her or another:

(a) By forcible compulsion;

(b) When the other person is incapable of consent by reason of being mentally defective, mentally incapacitated, or physically helpless;

(c) When the victim is a person with a developmental disability and the perpetrator is a person who is not married to the victim and who: (i) Has supervisory authority over the victim; or (ii) Was providing transportation, within the course of his or her employment, to the victim at the time of the offense;

(d) When the perpetrator is a health care provider, the victim is a client or patient, and the sexual contact occurs during a treatment session, consultation, interview, or examination. It is an affirmative defense that the defendant must prove by a preponderance of the evidence that the client or patient consented to the sexual contact with the knowledge that the sexual contact was not for the purpose of treatment;

(e) When the victim is a resident of a facility for persons with a mental disorder or chemical dependency and the perpetrator is a person who is not married to the victim and has supervisory authority over the victim; or

(f) When the victim is a frail elder or vulnerable adult and the perpetrator is a person who is not married to the victim and who: (i) Has a significant relationship with the victim; or (ii) Was providing transportation, within the course of his or her employment, to the victim at the time of the offense.

(2)(a) Except as provided in (b) of this subsection, indecent liberties is a class B felony.

(b) Indecent liberties by forcible compulsion is a class A felony.

COURT OF APPEALS OF WASHINGTON, DIVISION II

STATE OF WASHINGTON, **Respondent,** **vs.** **JEREMY OVERTON,** **Appellant.**	**NO. 49239-3-II** **AFFIRMATION OF SERVICE**

The under signed states the following under penalty of perjury under the laws of Washington State. On the date below, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

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Dated this 17th day of January, 2016, at Longview, WA.

Donna Baker

HAYS LAW OFFICE

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